

U.S. Department of Justice and the Federal Trade Commission

Labor and Equity Comments of 20 State Attorneys General in Response to January 18 Request for Information on Merger Enforcement

April 21, 2022

As State Attorneys General, we have come to recognize the effects of failing to account adequately for the impact of mergers on labor markets and on rural, elderly, and minority communities (the latter of which are collectively referred to herein as falling under the rubric “equity”). Mergers impact not only competition in individual markets but in many instances have also harmed the general economy of our states and the health and safety of our residents. The Attorneys General of California, Maryland, the District of Columbia, New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Rhode Island, Oregon, Pennsylvania, Washington, and Wisconsin submit these comments to address labor and equity issues in response to the January 18th Request for Information on Merger Enforcement, issued by the Department of Justice and Federal Trade Commission.

Consolidation in labor markets has reduced benefits and wages and increased the use of anticompetitive no-poach and non-compete agreements. When considered from the perspective of equity, anticompetitive mergers have harmed women, racial, and ethnic minorities in our states’ workforces, and reduced access to essential services such as healthcare for our residents, including those in rural and disadvantaged communities.

To the extent that defining relevant markets is necessary or useful in assessing the effects of mergers, relevant markets also appropriately encompass markets in rural and disadvantaged communities. The Clayton Act proscribes mergers that reduce competition in any line of commerce in any section of the country.¹ Hence, assessing the equity effects of mergers on rural or disadvantaged communities is a natural outgrowth of geographic markets based on the commercial realities of industries.² Enforcers may also assess product markets as identified by practical indicia such as the product’s peculiar characteristics and uses, sensitivity to price changes, or use by distinct customers.³ Thus mergers can reduce competition in distinct buyer segments or certain disadvantaged communities for both labor and product markets.⁴

¹ 15 U.S.C. § 7 (2022).

² *Brown Shoe Co. v. United States*, 370 U.S. 294, 336–37 (1962) (“The geographic market selected must, therefore, both ‘correspond to the commercial realities’ of the industry and be economically significant.”); U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines, §§ 3, 4.2.2 (2010) (“Horizontal Merger Guidelines”) (discussing impact of transportation costs on targeted customer choice and geographic markets tied to targeted customers).

³ *Brown Shoe Co.*, 370 U.S. at 325 (“The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”).

⁴ Horizontal Merger Guidelines, § 4.1.4 (discussing defining product markets by type or group of customers); see also *Fed. Trade Comm’n v. Whole Foods Mkt., Inc.*, 533 F.3d 869, 878-81 (D.C. Cir.) (recognizing potential impact of merger on submarket of premium, natural, and organic supermarkets targeted to a distinct or core group of

Further, as state enforcers, we perceive that a narrow focus only on price effects and purported efficiencies has ignored other potential merger harms such as the impact on labor markets and equity. Without a full analysis, the current guidelines are inadequate to arrest reductions in competition at the incipency of monopoly. An overemphasis on price effects and efficiencies is particularly concerning when we have the tools as enforcers to weigh direct evidence of potential harms. Direct evidence such as pre-merger documents that show intent to impair the competitive process and the ability to maintain durable profits in concentrated industries is available to enforcers in assessing harm. Accordingly, internal documents should receive significant weight when evaluating the potential anticompetitive effects of a merger. And consistently high profits from merging parties may indicate existing market power in an upstream market, as well as a downstream market.⁵ Market power can be exercised by lowering input costs (including labor), or by raising price, either of which will show up in durable higher profits, which is a sign of market power.⁶

Competition in a free and open economy advances the interests of every participant in our communities. Merger law is supposed to protect that competition, in whatever form and whatever market it may exist.⁷ Competition enables workers to move between competing employers based on better wages or superior working conditions. Employers and consumers gain motivated employees who are compensated for their skills and experience. Similarly, competition better enables residents to make a home in any community in the country and to retain access to essential services such healthcare and food. But as described below, enforcers cannot prevent the substantial lessening of competition in these markets and the inequitable impact on our residents without using a more robust assessment of mergers in already concentrated markets as appropriate, employing additional analytical tools to focus on labor and equity effects, and intensifying cooperation between state and federal enforcers on these issues.

I. Labor Markets

State Attorneys General are uniquely situated to opine on labor markets given the predominantly local nature of these markets. Injury to labor markets can and should be evaluated in merger reviews and should be a sufficient independent basis to challenge mergers under the

customers), *amended and superseded by*, 548 F.3d 1028 (D.C. Cir. 2008); *cf. United States v. Third Nat'l Bank in Nashville*, 390 U.S. 171 (1968) (discussing that in bank mergers, appropriate review includes “meeting the convenience and needs of the community”).

⁵ Ramsi Woodcock, *The Elephant in the Market Power Debate*, PROMARKET (Jan. 16, 2019), <https://promarket.org/2019/01/16/the-elephant-in-the-market-power-debate> (“Profits are the ultimate measure of market power.”).

⁶ *Cf.* Complaint at 5-6, 14-15, *People v. Sutter*, No. CGC-18-565398 (Cal. Sup. Ct. Mar. 29, 2018) (describing accumulated revenue and assets (i.e. profits) from health system’s exercise of market power).

⁷ *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (“[Section] 7 of the Clayton Act prohibits any merger which may substantially lessen competition ‘in *any line* of commerce’”) (emphasis in original). *See also, e.g., United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 368 (1963) (“Competition among banks exists at every level—price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, miscellaneous special and extra services—and it is keen; on this appellees’ own witnesses were emphatic.”).

Clayton Act. State Attorneys General have reviewed countless mergers, and our experience indicates that mergers can have horizontal and vertical implications in labor markets. Further, we have learned that some defenses or justifications raised by parties to justify mergers or partial tie-ups may ultimately prove to simply reflect the adverse effects of lessening competition when these transactions are evaluated with a focus on labor markets.

a. Labor Market Harm Can Provide a Sufficient Independent Basis for a Merger Challenge

Mergers of competing buyers can lessen competition in ways that are harmful to sellers.⁸ Workers are sellers of labor to merging parties and market participants for antitrust purposes.⁹ State Attorneys General not only are concerned about the impact of mergers on competition for the products and services offered by the merging parties, but also are equally concerned about the impact of mergers on sellers of labor that affect their states' economies.

Even when antitrust law was in its incipency, Senator Sherman himself recognized its importance to labor markets—"the law of selfishness, uncontrolled by competition...commands the price of labor without fear of strikes, for in its field it allows no competitors."¹⁰ This acknowledgement highlights the longstanding importance of considering labor in merger review.¹¹ And the role of labor in merger review is coming into even clearer focus as modern antitrust learning shows that labor has significant social and economic importance to *markets and communities*.¹² Anticompetitive effects from mergers that would harm input markets deserve the same level of scrutiny as those that would harm output markets. Thus, potential harm to a labor market should constitute sufficient grounds on its own to challenge a merger.¹³

Mergers of competing buyers risk the creation of monopsony power, which is generally understood to be the mirror image of monopoly power.¹⁴ Monopsony is defined as a market

⁸ Horizontal Merger Guidelines, § 12.

⁹ See *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) ("The Sherman Act, however, also applies to abuse of market power on the buyer side—often taking the form of monopsony or oligopsony.").

¹⁰ 21 Cong. Rec. 2457 (1890).

¹¹ Cf. Adam Smith, *THE WEALTH OF NATIONS* (1776) ("Masters, too, sometimes enter into particular combinations to sink the wages of labor even below this rate. These are always conducted with the utmost silence and secrecy, till the moment of execution, and when the workmen yield, as they sometimes do, without resistance, though severely felt by them, they are never heard of by other people.").

¹² See, e.g., Ioana Marinescu, *Fighting Monopsony: A Lack of Competition that Harms Workers* (2018), https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_marinescu_june_13_2018.pdf (last accessed Apr. 5, 2022).

¹³ See Elinor Hoffman, *Looking at Labor from Both Sides Now*, A New Future for Antitrust Conf. (Oct. 2019), https://economics.utah.edu/antitrust-conference/session_material/Looking%20at%20Labor%20from%20Both%20Sides.pdf; Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1034 (2019) ("Mergers affecting the labor market require some rethinking of merger policy, although not any altering of its fundamentals. For example, mergers that threaten wage suppression are horizontal when the merging firms compete in the labor market, and this may be true whether or not they are competitors in any product market.").

¹⁴ C. Scott Hemphill & Nancy Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2082 (May 2018).

situation in which *one buyer* controls the market.¹⁵ But, the more typical situation is oligopsony—control or domination of a market by a *few large buyers or customers*.¹⁶ Mergers that risk the creation of monopsonies or oligopsonies are problematic because combinations of competing buyers can harm sellers by increasing the merged firm’s incentive to cut back on its purchase of inputs in order to drive down prices.¹⁷ These concerns are most prominently observed in concentrated input markets where a merger between two competitors can manifest competitive harm through downward pressure on input prices, including labor.¹⁸ Current economic literature confirms that on average, labor markets covering 26 occupational categories in over 8,000 geographic markets in the United States are concentrated.¹⁹

In one among many recent publications about U.S. labor markets, the authors, using the tool typically used to measure product market concentration, the Herfindahl-Hirschman Index (HHI), found that labor markets on average are “highly concentrated.”²⁰ The labor markets studied had an average HHI of 3,157, which is well above the 2010 Horizontal Merger Guidelines threshold of 2,500 for high concentration.²¹ This is important because historical labor market literature had assumed that labor markets operated in a perfect competition environment; we are learning that this assumption is likely faulty. Importantly, research shows high and increasing labor market concentration has been associated with lower wages.²² This is an important factor to consider when mergers impact labor markets.

Increased buyer side power can cause harmful effects not only in input markets, but in output markets as well.²³ With regard to labor input markets, studies show that labor market power negatively associates with wages.²⁴ The potential for monopsony power to cause downstream product market harm is like that of monopoly power. Just as a monopoly depresses production, labor monopsony depresses employment which, like a monopoly, ends up having the same type of depressing effect on output.²⁵ That is, compared to a competitive market, a

¹⁵ *Monopsony*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁶ *Oligopsony*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁷ Hemphill & Rose, *supra* note 14, at 2079.

¹⁸ Hemphill & Rose, *supra* note 14, at 2086.

¹⁹ Jose Azar et al., *Labor Market Concentration* 2, at fig. 4 (Nat’l Bureau of Econ. Rsch., Working Paper No. 24147, 2019), DOI 10.3386/w24147.

²⁰ Azar et al., *supra* note 19, at 2.

²¹ Azar et al., *supra* note 19, at 2; *see also* Horizontal Merger Guidelines, §5.3.

²² Azar et al., *supra* note 19, at 23; Marinescu & Hovenkamp, *supra* note 13, at 1043.

²³ Hemphill & Rose, *supra* note 14, at 2079.

²⁴ Elena Prager & Matthew Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397, at 6 (2021), DOI: 10.1257/aer.20190690 (citing Jose Azar et al., *Labor Market Concentration*, at 1 (Nat’l Bureau of Econ. Res., Working Paper No. 24147, 2019), DOI 10.3386/w24147); Efraim Benmelech et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages* (Nat’l Bureau of Econ. Res., Working Paper No. w24307, 2022), DOI 10.3386/w24307; Kevin Rinz, *Labor Market Concentration, Earnings Inequality, and Earnings Mobility*, at 6 (U.S. Census Bureau, CARRA Working Paper No. 2018-10) (discussing strong negative association between employer concentration and wages—higher employer concentration is associated with lower wages.), <https://www.census.gov/content/dam/Census/library/workingpapers/2018/adrm/carra-wp-2018-10.pdf>.

²⁵ Azar et al., *supra* note 19, at 1038.

monopsonist will suppress its purchases of labor and drive wages down, which disincentivizes people to work. This leads to lower employment and lower production of output.²⁶ Thus, if a firm employs fewer workers than would be the case in a free market, it will produce less output, ultimately resulting in *higher prices of its products to consumers*.²⁷

While labor is a key input for production just like other inputs, labor markets have unique attributes. They are not fast moving nor transparent; so they have frictions, matching problems, and wide differentiation. And workers are not fungible like commodities. To that end, federal enforcers should consider expanding their merger review tool kit to better ferret out unique potential labor market harms. For example, consideration of impacts on workers or trading partners that reaches beyond restrictive interpretations of consumer welfare and is capable of taking into account the nuances and complexities of labor markets could be warranted.²⁸

Additionally, anticompetitive effects in labor markets can manifest independently of harms to an output market. Just as with other anticompetitive conduct, in mergers there can be labor market harms without downstream or product market harms (though those are likely as well).²⁹ *Weyerhaeuser* recognized that a predatory bidding scheme with *no consumer harm alleged* could still harm competition in input markets.³⁰ Another key example is the high tech no-poach cases where tech companies anticompetitively agreed not to poach each other's engineers.³¹ The companies were competitors for labor such that their collusion could plausibly reduce wage growth and employee mobility, but they were not necessarily horizontal competitors for the products they developed and sold. These examples show that labor market impacts of mergers should receive fulsome scrutiny on their own in merger enforcement.

As a result, consideration of potential labor market harms, independent of output harms, is important in fully assessing whether a merger will “substantially . . . lessen competition, or . . . tend to create a monopoly.”³² And, putting aside the prominence of the consumer welfare standard in antitrust jurisprudence *writ large*, consumer harm or downstream harm should not be a mandatory condition precedent to challenge a merger that may lead to anticompetitive outcomes in a relevant labor market. In concentrated labor markets like other concentrated buyer

²⁶ Azar et al., *supra* note 19, at 1038.

²⁷ Suresh Naidu, Eric Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 559 (2018); Federal Trade Comm'n, Public Comments of 18 State Attorneys General on Labor Issues in Antitrust at 8, Hearings on Competition and Consumer Protection in the 21st Century (2019), https://oag.dc.gov/sites/default/files/2019-07/State_AGs_Comments_to_FTC_on_Labor_Issues_in_Antitrust.pdf.

²⁸ Hemphill & Rose, *supra* note 14, at 2091.

²⁹ Office of the R.I. Att'y Gen., Decision Re: Hospital Conversions Act Initial Application of Rhode Island Academic Health Care System, Inc. 63, 59-60 (2022) (discussing merger that created a 67% buyer share of the registered nursing labor market and created monopolies in various inpatient services), <https://riag.ri.gov/press-releases/attorney-general-denies-application-merger-lifespan-and-care-new-england-health>.

³⁰ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. Inc.*, 549 U.S. 312, 324-35 (2007).

³¹ *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012).

³² 15 U.S.C. § 18 (2022).

markets,³³ the law and sound public policy support the appropriateness of addressing potential monopsony effects to protect the competitive process.³⁴

b. Post-Closing Restrictive Covenants Should Be Strictly Analyzed

Merger agreements and other transactional documents frequently contain restrictive covenants that inhibit competition for labor between parties after a deal has closed. Outside of the merger context, some of these agreements, typically no-poach or no hire agreements, might be illegal.³⁵ This problem is particularly exacerbated in non-horizontal deals, such as vertical mergers, partial acquisitions, or deals that involve a spin off. In those situations, or other situations that do not involve a full merger of assets, the remaining post-closing independent entities are capable of easily entering into anticompetitive contracts. The guidelines should be updated to recognize the anticompetitive concerns that can impact labor after a deal closes.

The guidelines generally focus on horizontal concerns, and historically there has been a lesser focus on non-horizontal issues, in particular vertical issues, where transactions at different levels of the distribution chain are alleged by parties to be neutral or procompetitive, and are rarely challenged. However, vertical relationships are not viewed through an equally neutral or positive lens in labor markets outside of the merger context, where the Agencies have long recognized that entities who may not compete in relevant product or service markets may be direct competitors for labor.³⁶ States have uncovered final agreements and other transaction documents, usually those that do not involve a full merger of assets, that contain restrictive covenants to commence upon closing of the transaction and continue to remain in place for years after a deal has closed. The guidelines should thus be updated to recognize restrictive labor covenants that result from a transaction as an area of scrutiny.

There is an established body of law that deals with agreements not to compete for labor prior to a transaction,³⁷ but courts have been more willing to uphold these restraints when they are contained in a purchase agreement.³⁸ While many restrictive covenants such as no-poach or no-hire agreements in transactional agreements have historically been viewed as valid ancillary restraints, and may in certain circumstances serve valid business purposes today, we have

³³ *Weyerhaeuser Co.*, 549 U.S. at 322 (“Both [monopsony and monopoly] claims involve the deliberate use of unilateral pricing measures for anticompetitive purposes”).

³⁴ *See, e.g., United States v. Anthem, Inc.*, 855 F.3d 345, 377-78 (D.C. Cir. 2017) (relying on the horizontal merger guidelines and remanding to district court to assess whether post-merger, an insurer could exercise market power in input market).

³⁵ This section does not address the propriety of post-merger non-compete agreements in the business context.

³⁶ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidance for Human Resource Professionals 2* (2016) (“[F]irms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.”).

³⁷ *See* Statement of Interest of the United States, *In Re: Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464 (W.D. Pa. 2019) (No. 2:18-MC-00798); *United States v. Knorr-Bremse AG*, No. 18-cv-00747, 2018 WL 4386565 (D.D.C. July 11, 2018).

³⁸ *Eichorn v. AT&T Corp.*, 248 F.3d 131, 143, 145 (3d Cir. 2001) (holding that because the no-hire agreement was an “ancillary” agreement “executed upon the sale of a corporation,” it was properly analyzed under the rule of reason.).

learned that many restrictions—especially covenants within labor markets—may not withstand independent antitrust scrutiny. Under the “ancillary restraints doctrine,” an agreement ordinarily condemned as per se unlawful is “exempt from the per se rule” only if it satisfies the requirements for being ancillary to a separate, legitimate venture between the competitors.³⁹ Ultimately, enforcers must closely examine these restraints in all transactions where they are present and be cautious not to give undue deference to a restraint merely because it is contained in a merger agreement. The guidelines should be updated to recognize that enhanced scrutiny of an ancillary restraint is appropriate in deals that do not involve a full merger.

Determining the exact relationship between parties for labor purposes can sometimes be tricky and has been the subject of vigorous debate. For example, it has been argued that the relationship between a franchisor and a franchisee can be vertical, horizontal, or both.⁴⁰ Likewise, an enforcer may see a relationship between merging parties that involves multiple relationships at different levels of the distribution chain. In some cases, the transaction itself alters the relationship between the merging parties, such as where a company spins off a division to a competitor of that division.

For example, a hospital may operate its own home health agency and decide to sell that division to a company that specializes in operating home health agencies. As part of that deal, the transaction agreement between the hospital and the purchasing home health agency could contain an agreement not to hire one another’s employees for a certain number of years. Prior to the closing of the transaction, an agreement not to hire one another’s home health employees may be viewed as per se illegal. Post transaction, the waters become muddier since the restriction is part of the merger. Further complicating the analysis, the selling hospital and the buying home health agency are no longer competitors for customers following the closing. However, they remain competitors for many classes of employees, such as nurses and physical therapists. The analysis to determine whether a relationship is vertical or horizontal in the context of a labor market has been the subject of some debate.⁴¹ But the potential anticompetitive effects of post-closing restrictions on employment remain and are not adequately addressed under the existing guidelines.

The merger guidelines should thus be updated to incorporate a more discerning analysis of restrictive covenants in the framework of a merger or other acquisition, particularly in cases in which an organization is spinning off a division where it is essential that employees be transferred and retained by the new entity.

³⁹ See Statement of Interest of the United States, *supra* note 37, at 10 (citing *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986)).

⁴⁰ Corrected Statement of Interest of the United States at 11-13, *Stigar v. Dough Dough, Inc.*, No. 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019); see also Brief for Attorney General of Washington as Amici Curiae at 6-7, *id.*

⁴¹ Brief for Attorney General of Washington as Amici Curiae, *supra* note 40, at 6-7.

c. Analyzing Defenses to an Otherwise Anticompetitive Merger – the Role of Labor Market Impacts

State Attorneys General, in the context of merger reviews, have learned from employers of all sizes that employee wages are often their largest expense, followed closely by employee healthcare costs. It is no surprise that elimination of jobs is routinely cited as a cost cutting measure and a key efficiency that should be considered as a defense to an otherwise anticompetitive deal.⁴² Although we rarely see cost savings passed through to consumers, we often see the detrimental effects of labor cuts on consumers through longer wait times (particularly frustrating and sometimes dangerous for patients who need access to healthcare), less production, and a reduction in quality arising from lower output.⁴³ There are also societal impacts, such as lower employment rates, reduced tax bases, and forced relocation of workers seeking employment.

The guidelines must better recognize the negative impacts an anticompetitive merger can have on labor markets. Reduction of labor resulting from a merger is not necessarily an efficiency with public benefits, but rather should also be evaluated as potential harm. Perhaps firms should be required to demonstrate how the merger will lead to the same or greater output with significantly fewer workers in the specific labor markets where anticompetitive effects are likely to occur.⁴⁴

Entry is another area where the guidelines must have a better focus on labor. The guidelines recognize that incumbent firms may “...have valuable intangible assets, which may be difficult or time consuming for an entrant to replicate.”⁴⁵ The guidelines enumerate elements of entry efforts that an entrant might practically employ, such as planning, design and management, permitting, licensing, construction, and marketing.⁴⁶ The guidelines should be updated to clarify that access to labor is a consideration when evaluating barriers to entry.

⁴² In order to be cognizable, the efficiencies must offset the anticompetitive concerns in the relevant highly-concentrated market. The efficiencies must be “merger-specific.” The efficiencies “must be verifiable, not speculative.” The efficiencies must not arise from anticompetitive reductions in output or service. *See Fed. Trade Comm’n. v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347-348 (3d Cir. 2016); Horizontal Merger Guidelines, §10; *United States v. Aetna, Inc.*, 240 F.Supp.3d 1, 94-96 (D.D.C. 2017); *United States v. Anthem, Inc.*, 236 F.Supp.3d 171, 237-38 (D.D.C. 2017).

⁴³ *See, e.g., Aleksandra Zarska et al., Relationship Between Working Conditions, Worker Outcomes, and Patient Care: A Theoretical Model for Frontline Health Care Workers*, 36 AM. J. OF MED. QUALITY 429, 434-37 (2021) (reviewing studies documenting association between poor working conditions including reduced staffing and lower wages and decreased quality of care and poor patient outcomes), DOI 10.1097/01.JMQ.0000735508.08292.73.

⁴⁴ *See also* Marinescu & Hovenkamp, *supra* note 13, at 1060 (noting that it does not help the company to show that it is saving on the number of accountants needed if the anticipated anticompetitive effects are on the market for nurses).

⁴⁵ Horizontal Merger Guidelines, § 9.

⁴⁶ *Id.*

Employee non-compete agreements utilized by the merging parties can play a key role in stifling entry.⁴⁷ They can prevent growth from existing players in a market,⁴⁸ including employees who could leave to create their own companies or from other market participants who could create competing divisions. They can also stymie new entrants, who face significant barriers in recruiting. This is particularly true in healthcare, where a significant percentage of employees are subject to non-competes.⁴⁹ For example, if the only two urology practices in a county decide to merge, and all their physicians are subject to county-wide non-compete agreements, none of the physicians could leave the merged entity and form a competing practice. Entry from outside the market is also stifled because it is unlikely a single urologist will enter the market to compete with a large established urology practice. Access to other medical and support staff is also considerably more difficult.

The Washington State Attorney General recently obtained a consent decree in a matter where, through the use of a combination of non-competes and exclusive contracts, an anesthesiology group locked up 90 percent of a two-county market for anesthesiology services.⁵⁰ This anticompetitive conduct made it nearly impossible for a competing practice to enter the market or for anesthesiologists new to the area to work for any other medical practice.⁵¹ This also blocked entry to the market for certified registered nurse anesthetists as they could not join the anesthesiology group.⁵²

The role of non-competes as related to entry should be carefully scrutinized on a case by case basis. Some states have required that physicians and other workers be released from non-compete agreements as part of a consent decree not to challenge a merger.⁵³ The current merger guidelines do not adequately consider this aspect of entry.

⁴⁷ See also Marinescu & Hovenkamp, *supra* note 13, at 1054-1057 (discussing other impacts of non-compete agreements in the context of evaluating a merger).

⁴⁸ See Statement of Interest of the United States at 7-8, *Samuel Beck v. Pickert Medical Group, P.C.*, No. CV21-02092 (Nev. Sup. Ct. Feb. 25, 2022) (“The post-employment restraints at issue here could be characterized as agreements among actual or potential competitors to allocate [markets]. . . Thus, they would constitute horizontal agreements to allocate territories subject to the per se rule . . .”).

⁴⁹ Erik B. Smith, *Ending Physician Noncompete Agreements—Time for a National Solution*, JAMA Health Forum, Dec. 3, 2021, DOI 10.1001/jamahealthforum.2021.4018.

⁵⁰ See Press Release, Office of the Wash. Att’y Gen., *Bellingham Medical Providers Must End Illegal Non-Compete Contracts, Pay \$110K as a Result of AG Ferguson Consent Decree* (Aug. 26, 2021), <https://www.atg.wa.gov/news/news-releases/bellingham-medical-providers-must-end-illegal-non-compete-contracts-pay-110k>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Amended Final Order ¶¶ 27.1 – 27.3, *Commonwealth v. Geisinger Health Sys. Fdn.*, No. 1:13-cv-02647 (M.D. Pa. 2013); Final Order ¶¶ 30.1-30.2, *Commonwealth v. Catholic Health East*, No. 2:07-cv-00708 (W.D. Pa. 2007); Press Release, Office of the Utah Att’y Gen., *Settlement: Utah v. DaVita /Total Renal Care* (Nov. 5, 2021), <https://attorneygeneral.utah.gov/settlement-utah-v-davita-total-renal-care/>.

II. Anticompetitive Mergers Disproportionately Reduce Access to Goods and Services by Disadvantaged, Elderly, and Rural Communities

As state enforcers tasked with safeguarding our residents, including those who are most vulnerable, we believe that we and our federal enforcers must squarely consider harms to equity in any merger analysis. We must take account of the growing academic literature and post-merger analysis that show anticompetitive mergers disproportionately eliminate access to essential goods and services for disadvantaged and rural communities and the elderly. Finally, merger review must account for the fact that when mergers reduce competition for workers, equity effects are involved as well.

a. Merger Review Should Consider Market Conditions Shaped by Historic Inequities

Historic discrimination against disadvantaged communities has impacted the structural competitiveness of these markets in ways that require sensitivity to whether those communities may be further disadvantaged by a proposed merger. For example, the presence or absence of healthcare providers in some communities, and the relative vigor of competition in those communities today, has been shaped by our nation's legacy of racial and ethnic segregation. Until 1965, the Hill-Burton Act permitted local governments and health systems to finance segregated hospitals reflecting segregated neighborhoods.⁵⁴ Civil rights groups successfully challenged the use of state and federal funds to build segregated hospitals in one state in 1963. But ultimately, facilities across the country also began admitting Black patients only after a massive federal and private enforcement effort and threats to withhold federal monies for Medicare and Medicaid.⁵⁵ That effort did not eradicate completely the prior disparities in access to and quality of care reflecting the prior segregation.⁵⁶

This historical backdrop of marginalization does not only concern disadvantaged groups. Historically rural communities have also suffered from lower investment and less availability of critical services. Today, disinvestment in rural areas as well as hospital and pharmacy closures have a disproportionate impact on rural communities, particularly on their most vulnerable residents who typically rely on Medicare or Medicaid for care.⁵⁷ Funding challenges have also limited the economic incentive to expand broadband access in rural communities.⁵⁸ Despite pre-

⁵⁴ See, e.g., *Simkins v. Moses H. Cone Mem'l Hospital*, 323 F.2d 959, 963-65 (4th Cir. 1963) (documenting subsidy of up to 50 percent of hospital construction costs and policies of refusing to admit black patients or grant admitting privileges to black doctors).

⁵⁵ David B. Smith, *POWER TO HEAL* 113-119 (2016) (federal government temporarily reassigned 1,000 Health, Education, Welfare employees to investigate and integrate hospitals in conjunction with private complainants).

⁵⁶ See, e.g., Gracie Himmelstein & Kathryn E.W. Himmelstein, *Inequality Set in Concrete: Physical Resources Available for Care at Hospitals Serving People of Color and Other U.S. Hospitals*, 50 INT'L J. HEALTH SERV. 363 (2020) (discussing continuing disparities in health system capital investments), DOI: 10.1177/0020731420937632.

⁵⁷ Jan M. Eberth et al., *The Problem Of The Color Line: Spatial Access To Hospital Services For Minoritized Racial And Ethnic Groups*, 41 HEALTH AFFAIRS (2022) (discussing likely disproportionate impact of rural hospital closures on Medicaid and Medicare patients), <https://doi.org/10.1377/hlthaff.2021.01409>.

⁵⁸ Sophia Campbell et al., *The Benefits and Costs of Broadband Expansion*, Brookings Inst. (Aug. 18, 2021), <https://www.brookings.edu/blog/up-front/2021/08/18/the-benefits-and-costs-of-broadband-expansion/>.

merger promises to maintain or even expand services, mergers may lead to a reduction in market access.⁵⁹

Many State Attorneys General have seen post-merger reductions of many essential services that have reduced the safety and health of our residents.⁶⁰ For example, despite raising prices and reducing wages,⁶¹ merged hospitals may reduce key services, placing the health and safety of our residents at greater risk. In a national study, merged hospitals were more likely to eliminate maternal/neonatal and surgical care and to reduce access to behavioral health services in rural areas.⁶² In Pennsylvania, a series of acquisitions has resulted in health systems such as Geisinger Health and the University of Pittsburgh Medical Center (UPMC) becoming dominant in multi-county regions.⁶³ Yet despite increases in net patient revenue at several of its acquired hospitals, UPMC opted to close at least five childbirth units at hospitals it acquired.⁶⁴ Such closures are associated with longer travel times for the expecting women and a higher number of pre-term and low weight births.⁶⁵ This reduction in access is particularly disturbing since racial and ethnic disparities persist in access to transportation, making it more difficult for certain

⁵⁹ Brian Spegele, *A City's Only Hospital Cut Services. How Locals Fought Back*, Wall St. J. (Apr. 11, 2021), <https://www.wsj.com/articles/a-citys-only-hospital-cut-services-how-locals-fought-back-11618133400> (documenting private equity investor's closure of a Wyoming hospital and attempts to prevent market entry by local competing services); see also FTC Commissioner Chair Lina Khan, Re: Request for Comment Regarding the 1995 Bank Merger Competitive Review Guidelines (2022) (discussing impact of post-merger closures in local rural markets), <https://www.justice.gov/atr/page/file/1474356/download>.

⁶⁰ Gregory Day, *The Necessity in Antitrust Law*, 78 WASHINGTON & LEE L.J. 1289, 1295-96 (2021) (discussing disinvestment and reductions in access to banking, telecommunications, and food deserts), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4742&context=wlulr>; see also Rohit Chopra & Jeremy C. Kress, Re: Antitrust Division Banking Guideline Review (discussing post-merger closure of local bank branches in low income neighborhoods, reductions in credit access, and deterioration of service quality), <https://www.justice.gov/atr/page/file/1330326/download>; Nora Esposito, SMALL BUSINESS FACTS: SPOTLIGHT ON MINORITY-OWNED EMPLOYER BUSINESSES 1 (2019) (discussing that majority of minority owned businesses are small businesses); Hoai-Luu Nguyen, *Are Credit Markets Still Local? Evidence from Bank Branch Closings*, 11 AM. ECON. J. 1 (2019) (discussing impact of local bank closures particularly on small businesses' access to credit).

⁶¹ Dan Arnold & Christopher M. Whaley, *Who Pays for Health Care Costs?: The Effects of Health Care Prices on Wages* (RAND, Working Paper No. WR-A621-2, 2021), https://www.rand.org/pubs/working_papers/WRA621-2.html (finding that hospital mergers lead to a \$521 increase in hospital prices, a \$638 reduction in wages, and are associated with a reduction in worker benefits).

⁶² Rachel M. Henke et al., *Access to Obstetric, Behavioral Health, Surgical Inpatient Services After Hospital Mergers in Rural Areas*, 40 HEALTH AFFAIRS 1627 (2021), <https://doi.org/10.1377/hlthaff.2021.00160>; see also Claire E. O'Hanlan et al., *Access, Quality, and Financial Performance of Rural Hospitals Following Health System Affiliation*, 38 HEALTH AFFAIRS 2095 (2019), <https://doi.org/10.1377/hlthaff.2019.00918>.

⁶³ Complaint, *United States v. Geisinger Health*, No. 4:20-cv-01383, at *22 to *23 (Aug. 5, 2020) (discussing Geisinger's 54 percent share of hospital services in a 6-county area), <https://www.justice.gov/atr/case-document/file/1313051/download>; see also *Commonwealth v. UPMC*, 129 A.3d 441, 445 (Pa. 2015) (discussing UPMC occupying nearly 60 percent of the market in the Pittsburgh region and 36 percent of the western half of Pennsylvania).

⁶⁴ Kris B. Mamula, *Leaving Bedford to Have Their Babies*, Pittsburgh Post-Gazette (Nov. 12, 2017), <https://newsinteractive.post-gazette.com/bedford-hospital/>

⁶⁵ Katy B. Kozhimannil et al., *Association Between Loss of Hospital-Based Obstetric Services and Birth Outcomes in Rural Counties in the United States*, 319 JAMA 1239 (2018), doi:10.1001/jama.2018.1830; see also Dan Santheimer et al., *Impact of Discontinued Obstetrical Services in Rural Missouri: 1990-2002*, 24 J. RURAL HEALTH 96 (2008) (finding an increased risk of low weight births), <https://doi.org/10.1111/j.1748-0361.2008.00115.x>

patients to obtain healthcare services. Relatedly, preventable maternal and infant mortality disparities persist in both rural and urban markets.⁶⁶

Historical discrimination and post-merger reductions of services have also shaped access to food for our residents.⁶⁷ During the 20th century, discrimination in housing and federal loan practices resulted in racially segregated cities and suburbs.⁶⁸ In the 1960s and 1970s, as inner cities shrunk, up to an estimated 90 percent of grocery stores similarly relocated to the suburbs leaving older, less white populations in the inner cities with reduced grocery options.⁶⁹ Today, after decades of mergers, Safeway and other grocery store chains continue to disproportionately close even profitable stores in these communities.⁷⁰ Commentators have also alleged that these chains have gained oligopoly power over food suppliers resulting in lower prices for chains, but higher prices for the independent stores that remain in disadvantaged communities.⁷¹ Due to transportation barriers, low income consumers in both rural and urban markets cannot avoid these prices.⁷² Like reductions in healthcare services, reducing access to grocery stores has similarly exacerbated racial and ethnic health disparities in both rural and urban communities.⁷³

⁶⁶ Samantha Artiga et al., *Racial Disparities in Maternal and Infant Health*, Kaiser Family Fdn. (Nov. 10, 2020) (documenting association of infant mortality with pre-term births and low birth weight), <https://www.kff.org/report-section/racial-disparities-in-maternal-and-infant-health-an-overview-issue-brief/>; see also Alexis Gadson et al., *Exploring the Social Determinants of Racial/Ethnic Disparities in Prenatal Care Utilization and Maternal Outcomes*, 41 SEMINARS IN PERINATOLOGY 308 (2017) (discussing proximity to a hospital is a key mediator in prenatal care utilization in cases of maternal death and access to transportation's impact on prenatal care), doi:10.1053/j.semperi.2017.04.008.

⁶⁷ Christopher Leslie, *Food Deserts, Racism, and Antitrust Law*, 110 CAL. LAW REV. ____ (forthcoming 2022).

⁶⁸ Christopher Leslie, *supra* note 67, at *11.

⁶⁹ *Id.* at *12.

⁷⁰ *Id.* at *21. These mergers have also widened the applicability of restrictive covenants imposed by chain grocery stores on lessees and buyers of closed grocery sites. *Id.* at *15-18. So even after leaving a market, the anticompetitive effects from use covenants that prohibit the use of the site for the sale of food continue to disproportionately impact disadvantaged communities. *Id.*

⁷¹ Tom Larson, *Why There Will Be No Chain Supermarkets In Poor Inner-City Neighborhoods*, 7 CALIF. POLITICS & POLICY 22, 23 (2003), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.575.5670&rep=rep1&type=pdf>; see also Claire Kelloway & Sarah Miller, FOOD AND POWER: ADDRESSING MONOPOLIZATION IN AMERICA'S FOOD SYSTEM, at 3-5, Open Mkt. Inst. (2019) (discussing oligopoly in complementary meat processing market that has also contributed to higher consumer prices, reduced consumer choice, and the closure of smaller farms and ranches in rural communities), <https://www.openmarketsinstitute.org/publications/food-power-addressing-monopolization-americas-food-system>.

⁷² Lillian MacNeill, *A Geo-Ethnographic Analysis Of Low-Income Rural And Urban Women's Food Shopping Behaviors*, 128 APPETITE 311 (2018), <https://doi.org/10.1016/j.appet.2018.05.147>; Mengyao Zhang & Debarchana Ghos, *Spatial Supermarket Redlining and Neighborhood Vulnerability: A Case Study of Hartford, Connecticut*, 20 TRANSACTIONS IN GIS 79 (2016) ("Low-income residents usually do not have enough economic support and/or access to transportation (e.g. personal cars) to travel that "extra" distance to buy healthy food from other stores or from chain supermarkets in the suburbs."), doi:10.1111/tgis.12142; Christopher Leslie, *supra* note 67, at *5 (citing Mary Story et al., *Creating Healthy Food and Eating Environments: Policy and Environmental Approaches*, 29 ANNUAL REV. PUB. HEALTH 253, 259 (2008) ("The most affected rural counties were in the Great Plains and Rocky Mountain regions, the Deep South, the Appalachian region of Kentucky and West Virginia, and the western half of Texas"))).

⁷³ See Sonje Hawkins, *Desert in the City: The Effects of Food Deserts on Healthcare Disparities of Low-Income Individuals*, 19 ANNALS HEALTH L. ADVANCE DIRECTIVE 116, 121-22 (2009) (summarizing disparities in cardiovascular disease and other chronic health conditions tied to access to healthy food); Carol R. Horowitz, et al.,

The current approach to analyzing non-price effects has not remedied the disparity in investment or market access for disadvantaged communities. For example, the review of the T-Mobile-Sprint merger inappropriately assumed that promised expansion of services in rural communities would offset acknowledged anticompetitive effects in urban markets. Instead, as some had envisioned before consummation of the merger,⁷⁴ T-Mobile opted to cease operating the telecommunications network that the divestiture buyer was relying on to provide services in rural markets. Rather than expanding the number of competitors in rural markets, reducing prices, and improving access, telecom prices have risen in urban markets or have failed to fall in rural markets, and the buyer, Dish Network, is relying on AT&T to access rural customers.⁷⁵ Dish Network's dependence on another major telecom competitor to access consumers decreases its incentives to vigorously compete with and displease AT&T. Ultimately, Dish Network's inadequacies as a buyer of divested assets further risks reducing competition in rural telecom markets.⁷⁶

Thus, for any alleged efficiencies in markets affected by historical inequities, we reiterate that the Guidelines should only recognize merger specific efficiencies that have been substantiated and occur within the same affected market.⁷⁷ To do otherwise is to pick and choose which of our disadvantaged, elderly, and rural communities may suffer greater anticompetitive effects from a merger. We have discussed above that with respect to labor markets and alleged efficiencies, firms should be required to demonstrate how the merger will lead to the same or greater output with significantly fewer workers in the specific labor markets where anticompetitive effects are likely to occur. In terms of equity effects, to the extent that there may be positive impacts on quality of services and access from firm integration, there may be alternatives that permit those same non-merger specific efforts (e.g. coordinating quality of

Barriers to Buying Healthy Foods for People with Diabetes: Evidence of Environmental Disparities, 94 AM. J. PUB. HEALTH 1549 (2004) ("The availability of these and other recommended foods in neighborhood food stores may influence the food choices of African American and Latino adults with diabetes."), <https://doi.org/10.2105/AJPH.94.9.1549>.

⁷⁴ Second Adm. Complaint, *New York v. Deutsche Telekom AG*, No. 1:2019-cv-05434, at *31 to *32 (S.D.N.Y. Aug. 14, 2019); see also Nicolas Economides et al., *Assessing DOJ's Proposed Remedy in Sprint/T-Mobile: Can Ex Ante Competitive Conditions in Wireless Markets Be Restored?*, at 6, 12 (NYU Stern Sch. of Bus. NET Inst. Working Paper No. 19-14, 2019), <http://dx.doi.org/10.2139/ssrn.3467663>.

⁷⁵ U.S. Bureau of Labor Stat., *Consumer Price Index for All Urban Consumers: Telephone Services in U.S. City Average*, Fed. Reserve Bank of St. Louis, <https://fred.stlouisfed.org/series/CUUR0000SEED> (retrieved on March 25, 2022); see also Becky Chao et al., *The Cost of Connectivity*, at 10, 29-34 (discussing access divide and high pricing in U.S. cities), https://d1y8sb8igg2f8e.cloudfront.net/documents/The_Cost_of_Connectivity_2020_XatkXnf.pdf; Tyler Cooper & Julia Tanberk, *Best and Worst States for Internet Coverage, Prices and Speeds, 2021*, BroadbandNow Res. (Nov. 5, 2021) (discussing access and high pricing between more rural states), <https://broadbandnow.com/research/best-states-with-internet-coverage-and-speed>.

⁷⁶ Kari Bode, *The Dish 'fix' for the T-Mobile-Sprint Merger Seems More Shortsighted than Ever*, Verge (July 21, 2021), <https://www.theverge.com/2021/7/21/22585761/dish-t-mobile-att-sprint-competition-editorial>.

⁷⁷ See, e.g., *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610-11 (1972) ("Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy."); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963); see also Philip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW*, at ¶ 972 (5th ed. 2020).

healthcare) without entrenching anticompetitive effects.⁷⁸ Finally, as described below, permitting defendants to offset anticompetitive effects in one market by alleging procompetitive effects in another market would only exacerbate the impact of mergers on reducing equality of access in markets.

b. Growing Evidence Shows Mergers Disproportionately Eliminate Access to Services by Disadvantaged and Rural Communities

We applaud the Federal Trade Commission taking action to examine the potential anticompetitive impact of Pharmacy Benefit Manager (“PBM”) conduct on drug affordability and access, including on specialty and independent pharmacies.⁷⁹ Over the past 20 years, consolidation amongst PBMs has led to the ‘big three’ PBMs holding 85-90% of the most profitable market share in the benefit management sector; in parallel, chain consolidation has resulted in chain drugstores, supermarkets, or large retailers like Walmart accounting for nearly 70 percent of prescriptions dispensed nationwide.⁸⁰ Vertical consolidation has also exacerbated effects since every major insurer now has a PBM. This consolidation has only magnified the impact of PBM conduct on the pharmacy market.

But as state enforcers that have witnessed the fallout of these mergers on equality of access for rural and disadvantaged communities, we urge federal enforcers to explicitly consider equality of access as an equity effect in merger review, including past trends that have already reduced access. Section 7 of the Clayton Act speaks to the proscription of anticompetitive mergers effecting “any line of commerce in any section of the country,” which not only supports looking at access issues in disadvantaged communities, but also supports looking at historical trends affecting those communities as a backdrop for evaluating proposed acquisitions going forward.

For example, mergers have created dominant PBMs, leading to concerns that the resulting “big 3” PBMs’ use contracting strategies that disadvantage independent pharmacies and that incentivize health insurers to steer patients towards large chain pharmacies, often pharmacies owned by CVS Health, which operates in both the PBM and pharmacy markets.⁸¹ As

⁷⁸ See Judgement, *People v. Sutter Health*, No. CGC-18-565398, at 8-9, 12-13 (Cal. Sup. Ct. Aug. 27, 2021) (prohibiting anticompetitive contracting involving tying of health system’s market power, but permitting clinical integration to reduce costs and increase quality of care); see also *Sutter Health* Complaint, *supra* note 6, at 15-16, 28-31 (describing health system’s use of market power, including ‘must have’ hospitals and hospitals in rural areas, to tie and increase prices in other geographic markets).

⁷⁹ Press Release, Fed. Trade Comm’n, *FTC Requests Public Comments on the Impact Pharmacy Benefit Managers’ Practices* (Feb. 24, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-requests-public-comments-impact-pharmacy-benefit-managers-practices>.

⁸⁰ Ellen Gabler, *How Chaos at Chain Pharmacies is Putting Patients at Risk*, N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/health/pharmacists-medication-errors.html>.

⁸¹ Markian Hawryluk, *How Rural Communities in Kansas and Across the U.S. Are Losing Their Pharmacies*, KCUR 89.3 (Nov. 16, 2021) (“Independent pharmacies are struggling due to the vertical integration among drugstore chains, insurance companies and pharmaceutical benefit managers, which gives those companies market power that community drugstores can’t match. ... As the insurers’ drug plans steered patients to their affiliated drugstores, independent shops watched their customers drift away.”), <https://www.kmuw.org/2021-11-16/how-rural->

a result, across the nation, there has already been a disproportionate closure of independent pharmacies in rural and minority communities.⁸² In California, pharmacy closures have occurred disproportionately in Latino and Black majority communities in Los Angeles and San Jose.⁸³ In Illinois, recent pharmacy closures have particularly impacted lower income, racially segregated areas leading to reduced access to care.⁸⁴ Minority neighborhoods in Chicago housed 15 percent of the 70 pharmacies that Walgreens decided to close nationally in 2017.⁸⁵ As a result of these closures, many residents no longer have a pharmacy within two miles of their homes with the burden falling most severely on the elderly.⁸⁶ This pattern of poor access is replicated in our rural communities, as 1,231 independently owned rural pharmacies closed between 2013 and 2018.⁸⁷

Ultimately, consolidation and closures have had a direct negative impact on access to healthcare and health outcomes. Among older patients, “pharmacy closures are associated with significant reductions in adherence to essential cardiovascular medications.”⁸⁸ Declines in adherence were most pronounced among older adults using independent pharmacies or living in low-access neighborhoods with fewer pharmacies and were consistent across several classes of cardiovascular medications.⁸⁹ Decreased access to medications was ultimately associated with poor health outcomes including increased death and hospitalization.⁹⁰ Finally, chain pharmacies do not typically offer patients the individualized care that independent pharmacies offer, which can lead to, for example, more medication mistakes.⁹¹ Thus, even if evidence demonstrated that pharmacy consolidation led to some cost reduction, that cost reduction would be offset by the reduction in consumer access to appropriate and convenient care.

communities-in-kansas-and-across-the-u-s-are-losing-their-pharmacies; Nat’l Community Pharmacists Ass’n, *Report for Patient Steering Survey* (2020), <https://ncpa.org/sites/default/files/2020-09/9.16.2020-NCPAPatientSteeringSurveyResults.pdf>.

⁸² Abiodun Salako et al., *Update: Independently Owned Pharmacy Closures in Rural America, 2003-2018*, RUPRI Ctr. for Rural Health Pol’y Analysis (2018), <https://perma.cc/9XKN-7TU2>; Jenny S. Guadamuz et al., *Fewer Pharmacies in Black and Hispanic/Latino Neighborhoods Compared with White or Diverse Neighborhoods, 2007-15*, 40 HEALTH AFFAIRS 802, 805 (2021), <https://doi.org/10.1377/hlthaff.2020.01699>.

⁸³ Guadamuz et al., *supra* note 82, at 806.

⁸⁴ John Gitta, *The Impact of Merger & Acquisitions on Smaller Pharmacy Market Participants and Consumers*, 27 ANNALS HEALTH L. ADVANCE DIRECTIVE 163, 165–66 (2018).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Salako et al., *supra* note 82, at 1.

⁸⁸ Dima M. Qato et al., *Association Between Pharmacy Closures and Adherence to Cardiovascular Medications Among Older US Adults*, 4 JAMA NETWORK OPEN e192606, e192614 (2019), doi:10.1001/jamanetworkopen.2019.2606.

⁸⁹ *Id.*

⁹⁰ Illeana L. Pena et al., *Medication Adherence: Importance, Issues and Policy*, 64 PROGRESS CARDIOVASCULAR DISEASES 111, 113 (2021), <https://doi.org/10.1016/j.pcad.2020.08.003>.

⁹¹ Ellen Gabler, *How Chaos at Chain Pharmacies is Putting Patients at Risk*, N.Y. Times (Jan. 30, 2020), <https://www.nytimes.com/2020/01/31/health/pharmacists-medication-errors.html>; Ephrem A. Aboneh et al., *Evaluation of Patient Safety Culture in Community Pharmacies*, 16 J. PATIENT SAFETY e18 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7809706/> (documenting independent status as a predictor of patient safety).

This reduction in access to pharmacy services has even impacted our states' rollout of essential public health services, including COVID-19 vaccinations. This highlights that reduction in access in affected communities has had severe impacts that warrant access being a focus in the guidelines as a part of merger analysis going forward. The initial federal vaccination effort focused on large chain pharmacies operated by retailers Walgreens and CVS, which lead to concerns that minority neighborhoods in "pharmacy deserts" would not have access to the vaccine.⁹² Public health experts have identified lack of pharmacy access as a major impediment to equity in the rollout of vaccines,⁹³ an obstacle undoubtedly exacerbated by the closures of both chain and independent pharmacies in these communities in the preceding years, as described above. Notably, while vaccination rates have slowed, the state of West Virginia was able to utilize its 250 independent pharmacies to roll out 100% of its first round of vaccine doses to elderly care facilities within one month, outperforming many areas relying on large chains.⁹⁴

States have used our enforcement and regulatory authority to attempt to curb some of these harmful effects. Since 2017, 48 states have enacted over 160 statutes that address some aspects of this behavior including reducing PBMs' self-dealing behavior, prohibiting 'gag' clauses that limit pharmacies from providing pricing information to consumers, and limiting below cost reimbursements to pharmacies.⁹⁵ States such as North Dakota and Arkansas have engaged, with some success, in high-profile litigation to defend these statutes from a coordinated onslaught of litigation by industry interests.

But, while states have had some successes, the impacts of mergers on inequality still remain as a local, regional, and national issue that should factor into merger reviews under federal law.⁹⁶ Even with state legislation, PBMs have continued to undermine independent pharmacies by preferencing their mail-order business.⁹⁷ And further consolidation in the mail-

⁹² CBS Chicago, *In Communities Deserted By Pharmacies, Advocates Fear Inequitable Covid-19 Vaccine Access* (Dec. 24, 2020), <https://chicago.cbslocal.com/2020/12/24/in-communities-deserted-by-pharmacies-advocates-fear-inequitable-covid-19-vaccine-access/>.

⁹³ Akilah Johnson, *Lack of Health Services and Transportation Impede Access to Vaccine in Communities of Color*, Wash. Post (Feb. 13, 2021), <https://www.washingtonpost.com/health/2021/02/13/covid-racial-ethnic-disparities/>.

⁹⁴ Stacey Mitchell, *Small Pharmacies Beat Big Chains at Delivering Vaccines. Don't Look So Shocked.*, Wash. Post (Feb. 5, 2021), https://www.washingtonpost.com/outlook/small-pharmacies-beat-big-chains-at-delivering-vaccines-dont-look-so-shocked/2021/02/05/6bb307ec-671b-11eb-886d-5264d4ceb46d_story.html.

⁹⁵ Brief for States of Minnesota et al. as Amici Curiae Supporting Appellees, *Pharm. Care Mgmt. Ass'n v. Wehbi*, 18 F.4th 956 (8th Cir. 2021), at 10.

⁹⁶ See also Phillip Longman & Lina Khan, *Terminal Sickness*, Wash. Monthly (Mar. 1, 2012) (documenting post-merger decline in airline service in Ohio, Pennsylvania, Missouri, and Tennessee despite increased demand in urban centers), <https://washingtonmonthly.com/2012/03/01/terminal-sickness/>; Open Markets Inst., *Airlines & Monopolies* (documenting decrease in the number of departures at large hub airports declined 6.2 percent and the decrease at small and non-hub airports was 31.5 percent), <https://www.openmarketsinstitute.org/learn/airlines-monopoly> (last accessed Mar. 12, 2022); Jack Nicas, *Airline Consolidation Hits Smallest Cities Hardest*, Wall St. J. (Sept. 10, 2015), (documenting decline in competition and air travel across all cities), <https://www.wsj.com/articles/airline-consolidation-hits-smaller-cities-hardest-1441912457>.

⁹⁷ Nat'l Assn of Specialty Pharm., *Re: FTC Study on Pharmacy Benefit Managers' (PBMS) Relationship with Affiliated and Independent Pharmacies* (Feb. 15, 2022) (discussing differential contracting and steering practices with respect to PBM-owned specialty pharmacies), <https://secureservercdn.net/166.62.112.219/a8a.f0b.mwp.accessdomain.com/wp-content/uploads/2022/02/FTC-Comment-Letter-NASP-D0987173.pdf>; see also Ark. Ins.

order pharmacy business is unlikely to be solved by disruptive entrants. In addition to the high barriers to entry raised by vertical mergers, mail-order pharmacies cannot confer the benefits of in-person consultation, nor can they provide the same clinical services as a local pharmacy. Finally, one of the largest online entrants, Amazon, has demonstrated an interest solely in profitable last mile mail delivery,⁹⁸ not in mail delivery to rural communities. Without concerted action by enforcers to consider the impact of horizontal and non-horizontal mergers on underserved and inelastic markets (e.g., rural, geographically narrower urban markets where access to transportation is an issue)⁹⁹ as well as policy changes, the ongoing erosion of competition in healthcare, food, and other services to rural residents and other vulnerable populations will continue unabated.

c. Mergers Can Disproportionately Result in Workplace Harm to Disadvantaged Communities

As further discussed above, consolidation has enhanced monopsony power leading to reduced benefits, lower wages, and poorer working conditions for workers.¹⁰⁰ In healthcare, this monopsony power can disproportionately reinforce poorer conditions for lower income, rural, and disadvantaged health workers. Historically, medical and nursing schools were both racially and gender-segregated, and most nurses and other support staff were women, operating in a low-paying “pink-collar” profession with limited labor protections or opportunities for advancement.¹⁰¹ That backdrop, which persists in some measure today, informs current equity concerns with the monopsony effects of mergers.¹⁰²

Dep’t, *Limited Scope Examination of Pharmacy Benefit Managers*, at 25 (2020) (discussing PBM pricing practices that favor national pharmacies), <https://ncpa.org/sites/default/files/2020-10/ark-doi-pbm-mmcc-examination.pdf>.

⁹⁸ Hal Singer & Ted Tatos, *Protecting the U.S. Postal Service from Amazon’s Anticompetitive Assault*, at 25-27 (2022), <https://www.econone.com/wp-content/uploads/2022/02/Protecting-the-USPS-from-Amazons-Assault-Singer-and-Tatos.pdf>.

⁹⁹ Christopher Leslie, *supra* note 67, at *27 to *30 (discussing anticompetitive impact of treating residents as homogenous consumers who can all drive to access alternative supermarket competitors within a city-wide geographic market).

¹⁰⁰ Elena Prager & Matthew Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals* 111 AM. ECON. REV. 397 (2021), DOI: 10.1257/aer.20190690; *see also* Jose Azar et al, *Labor Market Concentration* (Nat’l Bureau of Econ. Res., Working Paper No. 24147, 2019) (discussing how increases in market concentration correlate with 5-17 percent decrease in wages), DOI 10.3386/w24147; Ioana Marinescu et al., *Wage Inequality and Labor Rights Violations* (Nat’l Bureau of Econ. Res., Working Paper No. 28475, 2021) (discussing correlation between increases in labor violations and increases in local labor market concentration), DOI 10.3386/w28475.

¹⁰¹ *See generally* Gabriel Winant, *THE NEXT SHIFT: THE FALL OF INDUSTRY AND THE RISE OF HEALTH CARE IN RUST BELT AMERICA* (2021).

¹⁰² *See* Samantha Artiga et al., *COVID-19 Risks and Impacts Among Health Care Workers by Race/Ethnicity*, Kaiser Family Fdn. (Nov. 11, 2020) (analyzing Department of Labor data documenting that Black and Hispanic health care workers made up relatively larger shares of health aides, personal care workers, and direct contact support workers), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/covid-19-risks-impacts-health-care-workers-race-ethnicity/>; *see also* Kathryn E.W. Himmelstein & Atheendar S. Venkataramani, *Economic Vulnerability Among US Female Health Care Workers: Potential Impact of a \$15-per-Hour Minimum Wage*, 109 AM. J. PUB. HEALTH 196 (2019) (discussing continuing gender and minority inequities in pay and benefits among healthcare workers), <https://doi.org/10.2105/AJPH.2018.304801>.

The impact of mergers and accumulated market power on such workers can be particularly pernicious when an employer participates in multiple complementary markets. It is well known that minority workers, particularly Black workers, are disproportionately at risk of incurring medical debt even with health insurance, but additional serious equity problems can arise due to market consolidation.¹⁰³ Mergers can create one entity that controls many market levers at once: as the provider, it sets the cost of care; as the insurer, it determines the provider network and determines coverage and copays; and finally, as the employer, it controls wages and dictates what health plans will be offered to its employees. In California, enforcers have observed that large healthcare systems will aim to acquire facilities that many of their employees utilize, ensuring that healthcare spending by their employees reverts directly back to their employer. Systems then use this closed loop to bargain with insurers to raise reimbursement rates.

These anticompetitive effects are not isolated to healthcare labor markets. Rather these effects likely extend to vulnerable workers in other labor markets. These comments discuss above the relationship between market power and the use of non-compete and no-poach contracts, but the use of such contracts can disproportionately impact minority workers in low wage industries. No-poach contracts, for example, affect an estimated 25 percent of fast food workers.¹⁰⁴ As with health workers in disadvantaged areas, workers from racial and ethnic minorities historically have been over-represented in the restaurant industry and did not benefit from federal minimum wage protection until 1966.¹⁰⁵ Today, women and minorities remain over-represented in certain industries, including the fast food industry.¹⁰⁶ In our experience as state enforcers, these fast food workers still remain disproportionately exposed to harm such as wage theft.¹⁰⁷ Consolidation in complementary food markets, especially meat processing, has similarly

¹⁰³ Andre R. Perry et al., *The Racial Implications of Medical Debt*, Brookings Inst. (Oct. 5, 2021), <https://www.brookings.edu/research/the-racial-implications-of-medical-debt-how-moving-toward-universal-health-care-and-other-reforms-can-address-them/>.

¹⁰⁴ Gregory Day, *Anticompetitive Employment*, 57 AM. BUS. L.J. 487, 495 (2020) (discussing impact of no-poach agreements on an estimated 25 percent of fast food workers), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3575809.

¹⁰⁵ Ellora Derenoncourt & Claire Montialoux, *Minimum Wages and Racial Inequality*, 136 Q.J. ECON. 169 (2021), <https://doi.org/10.1093/qje/qjaa031>.

¹⁰⁶ See Restaurant Opportunities Centers United, *Ending Jim Crow in America's Restaurants*, at 1-3 (2015) (discussing gender and minority concentration in low wage workforce and limited opportunities for advancement), <https://laborcenter.berkeley.edu/pdf/2015/racial-gender-occupational-segregation.pdf>.

¹⁰⁷ Brian Justie et al., *Fast Food Frontline*, at 24-25, UCLA Labor Ctr. (2022) (describing prevalence of up to 64 percent of fast food workers experiencing wage theft), <https://www.labor.ucla.edu/wp-content/uploads/2022/01/Fast-Food-Frontline-Report-1-3-22.pdf>; see also Press Release, Office of the Attorney General for the District of Columbia, *Attorney General Racine Secures Lost Wages for Employees of Fast Food Franchises in the District* (May 18, 2018), <https://oag.dc.gov/release/attorney-general-racine-secures-lost-wages>; Dan Porchilo, *NY AG Probes Purported Wage Theft By Fast Food Cos.*, Law360 (May 16, 2013), <https://www.law360.com/articles/442407>; see also David Cooper & Teresa Kroeger, *Employers Steal Billions From Workers' Paychecks Each Year*, at 15-20, Econ. Pol'y Inst. (2017) (discussing disproportionate prevalence of wage theft among minorities and women), <https://files.epi.org/pdf/125116.pdf>; Daniel J. Galvin, *Deterring Wage Theft*, 14 PERSPECTIVE ON POLITICS 324, 325, 331 (2016), <https://faculty.wcas.northwestern.edu/~djg249/galvin-wage-theft.pdf>.

exposed predominantly Latino workers to lower wages and unsafe working conditions,¹⁰⁸ and simultaneously exposed Latino households to higher consumer prices.¹⁰⁹

Ultimately, COVID-19 exposed the underlying fragility and concentration of labor markets and the deleterious impact of concentrated labor markets on health outcomes. In California, where state statutes and regulations set minimal healthcare staff to patient ratios, authorities were forced to grant a partial exemption due to surging COVID-19 cases.¹¹⁰ COVID tightened labor supply as workers burned out or quit. Yet, companies may still refuse or are reluctant to raise wages in response to wage competition and the lower supply of healthcare workers. This supports recent work that shows that hospital mergers that result in highly concentrated markets depress wage growth. This wage depression effect is particularly salient among workers with skills specific to the healthcare sector and where acquisitive health systems have sought to exclusively contract with healthcare workers.¹¹¹ This reinforces the need to consider not just the monopsony effects in general from mergers, but also the need to consider whether a merger results in equity effects in labor markets.

These experiences suggest that consideration of equity effects of mergers requires a wider consideration of qualitative evidence. For example, testimonial evidence from the largest business rivals and merging company executives are not the only relevant source of information during merger review on its impact.¹¹² In addition to greater collaboration among the National Labor Relations Board, the Antitrust Division, and the Federal Trade Commission on mergers or similar employer organizational actions that might impact organizing or bargaining efforts and require greater retaliation protections,¹¹³ past labor violations and non-supervisory employees' testimony may reveal the potential impact of an acquiring company on equity.¹¹⁴

¹⁰⁸ Rebecca Boehm, *Tyson Spells Trouble for Arkansas*, Union of Concerned Scientists (Aug. 11, 2021), <https://www.ucsusa.org/resources/tyson-spells-trouble#read-online-content>; Debbie Berkowitz & Hooman Hedayati, *Osha Severe Injury Data from 29 States*, at 2-4, Nat'l Emp. Law Project (2017), <https://www.nelp.org/news-releases/osha-severe-injury-data-report/>; Michael Grabell et al., *Emails Reveal Chaos as Meatpacking Companies Fought Health Agencies Over COVID-19 Outbreaks in Their Plants*, ProPublica (June 12, 2020), <https://www.propublica.org/article/emails-reveal-chaos-as-meatpacking-companies-fought-health-agencies-over-covid-19-outbreaks-in-their-plants>.

¹⁰⁹ Kelsea K. Sutton, *The Beef with Big Meat: Meatpacking and Antitrust in America's Heartland*, 58 S.D. L. REV. 611, 620-21 (2013); Morgan E. Ellithorpe et al., *Family and Cultural Perceptions About Meat Consumption among Hispanic/Latino and White Adults in the United States*, ECOLOGY OF FOOD & NUTRITION 1 (forthcoming) (discussing factors contributing to inelasticity of demand for meat), doi: 10.1080/03670244.2021.2018309.

¹¹⁰ See, e.g., Cal. Health & Safety Code § 1276.4 (West 2022) (nurse to patient ratios for hospitals) and §§ 1276.5, 1275.6, 1276.65(c) (nurse to patient ratios for nursing homes).

¹¹¹ See Section I.c; Prager & Schmidt, *supra* note 100, at 397.

¹¹² See Horizontal Merger Guidelines, § 2.2 (describing sources of evidence).

¹¹³ Press Release, Nat'l Labor Relations Bd., *NLRB General Counsel Releases Memorandum on Strengthening Inter-Agency Coordination* (Feb. 10, 2022), <https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-releases-memorandum-on-strengthening-inter-agency>.

¹¹⁴ See, e.g., Cal. Nurses Ass'n, *Fall from Grace St. Joseph Health RNS Raise Ethical and Patient Care Concerns* (2015), https://www.nationalnursesunited.org/sites/default/files/nnu/files/SJHS/0815_SJH_FallingFromGrace_Report2.pdf; see also Alexandra Zarska et al., *supra* note 43, at 429, 436-37 (discussing predominantly female and minority nursing home and home health workers whom provide care to the elderly and adults with disabilities or

III. Cooperation Between State and Federal Enforcers Permits Remedies That Address Effects of Mergers on Equity and Labor Monopsony

Ultimately, consistent cooperation between state and federal enforcers may better enable remedies targeted at the full range of harms from the effect of mergers on equity and labor markets. The current federal framework for insurance mergers for example can account for equity harms in some markets involving persons over the age of 65 and with disabilities enrolled in Medicare Advantage.¹¹⁵ Blocking the *Aetna-Humana* merger likely protected lower prices and prevented benefit reductions for seniors.¹¹⁶ But thus far, the potential impact of mergers on other disadvantaged and rural communities remains inadequately remedied in federal merger analysis.

Consistent cooperation between state and federal enforcers may also reveal that mergers have inequitable effects on both labor markets and on access in local markets. For example, as state enforcers, we have an interest in maintaining quality of services and encouraging innovation among managed Medicaid health plans. This product market is often tied to local county markets and targeted to a distinct set of customers that struggles to access healthcare services.¹¹⁷ Recent state and federal cooperation also revealed that a potential merger would impact 67 percent of the market for full time registered nurse services, and would create a monopoly in the inpatient behavioral health market.¹¹⁸ In addition to remedies under federal law, consideration of remedies through state law would enable enforcers to consider remedies that include conditions that preserve access for our vulnerable residents. These remedies can include requiring non-discrimination based on source of payer provisions and maintenance of access provisions for indigent, Medicaid, and Medicare patients, as well as other targeted remedies.¹¹⁹

chronic conditions, health workers' experiences with high turnover and lower wages, and the link between poor working conditions and poor patient outcomes).

¹¹⁵ See *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 28-29, 41-42 (D.D.C 2017) (accepting Medicare Advantage as a distinct market and noting tendency of low income seniors to seek low out of pocket cost health plans)

¹¹⁶ *Id.* at 43-46 (discussing merger's substantial lessening of competition on price and quality via impact on seniors in North Carolina and Texas).

¹¹⁷ See Mass. Health Pol'y Comm'n, *The Proposed Merger of the Lahey Health System*, at 88-92, 97-100 (2018) (discussing potential financial impact on Medicaid and non-white patient populations served by affiliates of merging parties and failure of parties to commit to ensuring such populations have access to key behavioral health services), <https://www.mass.gov/doc/final-cmir-report-beth-israel-lahey-health/download>; see also Maiuro Health Consulting, *An Evaluation of the Proposed Change in Control of St. Mary Medical Center*, at 66-74 (2021) (discussing incentives to reduce proportion of services provided to Medicaid patients and availability of services to pediatric patients), <https://oag.ca.gov/system/files/media/smmc-impact-report-2021-redacted.pdf>.

¹¹⁸ Office of the R.I. Att'y Gen., *Decision Re: Hospital Conversions Act Initial Application of Rhode Island Academic Health Care System, Inc.*, at 63, 59-60 (2022), <https://riag.ri.gov/media/2996/download>.

¹¹⁹ Office of the Cal. Att'y Gen., *Attorney General's Conditions to Proposed Sale of Adventist Health Vallejo*, at 3, 12 (2021) (discussing provisions to maintain access, and to address staffing adequacy and quality of care for patients with serious mental health needs), <https://oag.ca.gov/system/files/media/ahv-ag-decision-conditionally-approving-transaction.pdf>; *Commonwealth v. UPMC*, 129 A.3d 441, 446 (Pa. 2015) (describing original settlement to preserve Medicare Advantage access); see also Alexander D. Montague, *State Action to Oversee Consolidation of Health Care Providers*, at 7-8, Millbank Mem'l Fund (2021) (describing range of states' statutory authorities with respect to health provider consolidation), https://2zele1bn0sl2i91io41niae1-wpengine.netdna-ssl.com/wp-content/uploads/2021/08/State-Action-to-Oversee-Consolidation_ib_V3.pdf.

Targeted remedies under state law in particular may provide a unique opportunity for collaboration. For example, under state charitable trust law, the state of Rhode Island required a private equity fund divesting from a health system to maintain its financial reserves and for the buyer to continue the operation of essential safety net services.¹²⁰ Other states have preserved access by patients with disabilities to life preserving services such as dialysis in rural areas and prohibited the enforcement of non-competes.¹²¹ In addition to ending no-poach agreements at 237 franchisee chains, the state of Washington's investigation into no-poach agreements has inspired accompanying state legislation, which now bans no-poach agreements as well as non-competes for lower-wage employees.¹²² Franchisors, employers, and companies using independent contracts are now subject to penalties when they restrict the hiring of employees and enter non-compete agreements.¹²³ As part of future investigations in the District of Columbia, retaliation against employees or medical specialists that report the use of non-competes to government entities is prohibited.¹²⁴

Together, as enforcers, we welcome the opportunity to restore competition to our national, state, and local markets, and to ensure that merger enforcement reflects the impact of anticompetitive effects on both labor markets and the diverse needs of our rural, elderly, and disadvantaged communities.

¹²⁰ Office of the R.I. Att'y Gen., Decision in Prospect Medical Holdings HCA Review, at 28, 35-37 (2021), https://riag.ri.gov/sites/g/files/xkgbur496/files/documents/prospect_presentation.pdf (last accessed Apr. 21, 2022).

¹²¹ Settlement Agreement & Order, *State v. DaVita, Inc.*, 2021 UT _ (No. 210905956) (Oct. 29, 2021) (preserving access to rural dialysis clinic), <https://attorneygeneral.utah.gov/wp-content/uploads/2021/11/2021-11-03-UAGO-DaVita-Settlement-Agreement-FINAL.pdf>.

¹²² Wash. Rev. Code Ann. § 49.62.005 et seq. (West 2022) (banning non-competes for employees and independent contractors when earnings are below \$100,000 and \$150,000, respectively); *see also* D.C. Code § 32-301 et seq. (2022) (prohibiting employee non-compete agreements and requiring notice of the prohibition); Nev. Stat. Rev. § 613.95 (2022) (banning non-compete agreements for employees compensated on an hourly wage basis); 820 Ill. Comp. Stat. § 90/1 et seq. (2022) (rendering unenforceable non-compete agreements for employees earning less than \$75,000 and prohibiting no-solicitation agreements for employees earning less than \$45,000); Colo. Rev. Stat. § 8-2-113 et seq. (2022).

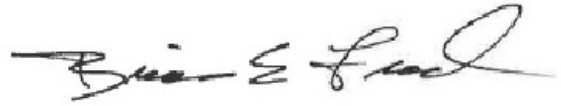
¹²³ Wash. Rev. Code Ann. §§ 49.62.020, 49.62.030, 49.62.040 (West 2022).

¹²⁴ D.C. Code §§ 52-581.02(d), 52-591.03(b) (2022).

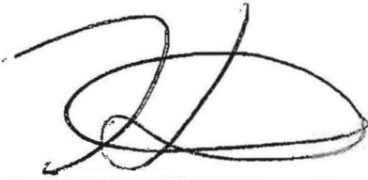
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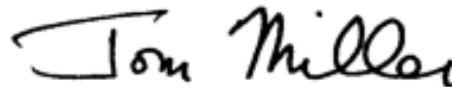
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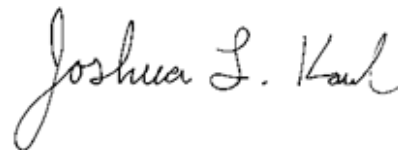
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